In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 957

JESSIE M. YATES, PETITIONER

v.

BERNARD J. MANALE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioner seeks review of a judgment of the court of appeals entered on June 7, 1967, and issued as a mandate on July 14, 1967 (Pet. 1, Pet. App. B. 36–37). No extension of time within which to file a petition for a writ of certiorari was obtained, and the petition, filed on December 26, 1967, is thus out of time under the jurisdictional provisions of 28 U.S.C. 2101(c).

2. Although we do not view the petition as applying for review of a subsequent judgment of the court below, entered on October 26, 1967, we believe it is appropriate to call the Court's attention to this judgment, and the reasons why, even if the Court were to

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treat the petition as timely, there would be no occasion for further review.

Petitioner was a stenographic traffic clerk with the Army Overseas Supply Agency. In November, 1962, she was requested by her superior to take a medical examination to determine her fitness for duty. See Executive Order No. 4071, 5 C.F.R. 29.6 (1961 ed.). Despite the advice that refusal to take the fitness examination could be viewed as insubordination, she persisted in her refusal and was accordingly dismissed. After the Civil Service Commission and the Board of Appeals upheld the dismissal, petitioner brought suit in the district court, seeking reinstatement. After the proper parties defendant had been named in an amended complaint (see Pet. App. C. 38–39), the district court determined that the discharge had been proper (Pet. App. E. 41–45), and the court of appeals on June 7, 1967, affirmed, "without prejudice to * * * [petitioner's] raising, if she chooses, in the court below the issue of her competency on the date of her refusal to submit to the examination" (Pet. App. A. 34).[1] (The petition asks review of that judgment only.)

Subsequently, pursuant to the suggestion by the court below, petitioner filed a motion in the district court "to raise issue of appellant's competency on date of refusal to submit to medical examination" (Pet. App. D. 40). But in this proceeding petitioner contended that she *was* competent; since this assertion

[1] Petitioner's pension rights, etc., apparently might have been preserved if she was found to have been incompetent at the time of her discharge.

was not contested, the district judge declared the motion moot, and a minute entry was made to that effect on August 2, 1967 (*ibid.*). An appeal was taken from that entry, but was dismissed by the court of appeals on October 26, 1967. Although petitioner mentions this action (Pet. 26), she does not ask to have it reviewed (see Pet. 1; see, also, Rule 23(1)(b)(i) of the Rules of this Court), any more than she seeks review of other miscellaneous matters (see Pet. 17–25).

In any event, since in the district court petitioner herself affirmatively asserted her competency, the court of appeals correctly dismissed the appeal from the August 2, 1967, minute entry.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1968.

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